A **DATO' RAJA AZWANE RAJA ARIFF**

v.

DATO' MAN MAT & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: D-24NCC-117-2010]
18 MARCH 2011

C ***COMPANY LAW:*** *Directors - Removal/resignation - Director's circular resolutions seeking to 'resign'/'remove' plaintiff as Finance Director - Second resolution passed to correct mistake on first resolution replacing 'resign' with 'removal' - Whether second resolution was issued same day after mistake was realised - Whether second resolution was backdated -* D *Whether plaintiff not given adequate prior notice of proposed action - Whether resolutions could be validated as a matter of internal management - Whether passing of resolutions tainted with mala fides*

E This was a challenge by the plaintiff against two Directors' Circular Resolutions of the 3rd defendant, a company known as Maya Maju (M) Sdn Bhd ('the company'), who sought to 'resign' or 'remove' him as its Finance Director and deny his entitlements deriving from that position. The challenged resolutions were purportedly passed by the majority of the directors pursuant to F art. 90 of the company's Articles of Association. The plaintiff, the 1st defendant and 2nd defendant were the only directors of the company at the material time. The undated first Circular Resolution ('first resolution') signed by the 1st and 2nd defendants was sent to the plaintiff *vide* a letter dated 5 January 2010 with G the word 'resign' on it. It was also made clear to the plaintiff that he would remain as an ordinary director of the company. The plaintiff protested to the first resolution in writing and on 25 January 2010, he received the second Circular Resolution ('second resolution') dated 4 January 2010 from the 1st defendant H replacing the word 'resign' with 'removal'. Hence, the plaintiff's application, *inter alia,* to declare the said resolutions as invalid, null and void.

Held (allowing the plaintiff's application with costs):

I **(1)** The plaintiff claimed that the second resolution was backdated to 4 January 2010 due to his protest to the first resolution. That contradicted the 1st defendant's claim that the second

resolution was not backdated as he had directed the second resolution to be prepared on the same day after realising the mistake on the first resolution. His version of the facts was found to be inherently improbable due to the fact that he had not given a credible explanation for sending the second resolution *vide* a letter dated 25 January 2010 if he had prepared it on the same day as the first resolution. The 1st defendant also failed to explain the reason for expressly informing the plaintiff on his effective removal date *ie*, from 1 January 2010 *vide* that same letter. (para 14)

(2) As fiduciaries, the directors were required to act with general interest of the company in mind within their scope of their duties and functions. It was evident that the first resolution was intended to seek a unanimous decision on the plaintiff's resignation and when the plaintiff refused, the second resolution was then prepared and circulated to him for approval. The second resolution was not and could not have been a 'corrective' resolution prepared on the same day as the first resolution. Both resolutions have the same intended effect of removing the plaintiff from his position of Finance Director. (paras 15-16)

(3) A director affected by a circular resolution should be given adequate prior notice allowing him to have knowledge of any proposed action to present his views. Equitable considerations would require the notice to not only be procedurally proper but also *bona fide* and effective. The fact of sending a circular for signature as a *fait accompli* and the attempt to achieve a unanimous decision to have the plaintiff retire as Finance Director could not be an act to be passed as a valid decision. The factual pattern demonstrated an exercise of corporate power done *mala fide* and for an improper purpose in law. Although the end reason would be capable of justification, the manner of arriving at that decision should be regarded as equally important. The circulars could be validated as a matter of internal management and, thus, should not be invalidated by the court. (paras 20-22)

(4) Since company directors are fiduciaries, the exacting law should apply to them. There was sufficient justification in law to regard the two circular resolutions as being tainted with *mala fides* and passed by the majority directors for an improper purpose. (para 26)

A **Case(s) referred to:**
Bentley-Stevens v. Jones & Ors [1974] 2 All ER 653 ***(refd)***
Browne v. La Trinidad [1888] 37 Ch D 1 ***(refd)***
Chan Choon Ming v. Low Poh Choon & 4 Ors [1995] 1 CLJ 812 HC ***(refd)***
Dato' Raja Azwane v. Dato' Man Mat & Anor [2010] 1 LNS 1036 ***(refd)***
B *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Cases [2010] 1 LNS 594 CA* ***(refd)***
Khoo Choon Yam v. Gan Miew Chee & Ors [2000] 2 CLJ 788 HC ***(refd)***
O'Neill v. Phillips [1999] 2 BCLC 1 ***(refd)***
See Teow Chuan & Anor v. YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors [2007] 2 CLJ 82 CA ***(refd)***

C **Legislation referred to:**
Companies Act 1965, s. 167(6)

For the plaintiff - Ranjit Singh (Justin TY Voon & Lee Choo Peng with him); M/s Sidek Teoh Wong & Dennis
D *For the defendants - Dato' Manokaran (MR Kumar with him); M/s Kumar Assocs*

Reported by Melanie Murthy

E

JUDGMENT

Mohamad Ariff Yusof J:

[1] In this originating summons application, I had earlier granted
F an order favouring the plaintiff in relation to his application under s. 167(6) of the Companies Act 1965 to allow him access to certain identified company documents and to make copies thereof consistent with his status as a Director of the 3rd defendant, namely Maya Maju (M) Sdn. Bhd ("Maya Maju").

G **[2]** In this present application, which comes subsequent to the s. 167(6) Order, the plaintiff purports to challenge two Circular Resolutions of Maya Maju that sought to "resign" or "remove" him as the Finance Director of Maya Maju as well as the denying
H him his entitlements as Finance Director. Several declarations are sought in this connection, and these can be seen pleaded in prayers (i), (ii) and (viii). In essence the plaintiff is now seeking for declarations that the first and second Circular Resolutions are invalid, and null and void, and further for an order that the sum

I

of RM465,000, representing the back payments of his remuneration as Finance Director from January 2010 until March 2011, be paid to him.

[3] The challenged resolutions are Directors' Circular Resolutions purportedly passed by the majority of the directors under Article 90 of the Company's Articles of Association, which reads:

> A resolution in writing signed by a majority of the directors present in Malaysia entitled to receive notice of meeting of the directors, shall be as valid and effectual as if it had been resolved at the meeting of the directors duly convened and held.

[4] Both challenged Circular Resolutions are signed by the majority of the directors, on the facts of this case, by the 1st and 2nd defendants. The 1st and 2nd defendants and the plaintiff are the only three directors of Maya Maju at the material times.

The Background Facts

[5] The relevant background facts can be briefly stated. The relevant Circular Resolutions are exhibited as exhs. "DRA2" and "DRA5" to the plaintiff's affidavit in support of this application. The first Circular Resolution is undated and reads as follows:

> We, the undersigned directors of the ... company pursuant to Article 90 of the Company's Articles of Association do hereby
>
> RESOLVE:
>
> RESIGNATION AND APPOINTMENT OF FINANCE DIRECTOR
>
> That authority be and is hereby given to the Company to resign YM Raja Dato' Azwane bin Raja Ariff as Finance Director in charge of and responsible for the accounts and financial aspect cum materials procurement and Dato' Hj Man bin Mat be and is hereby appointed to take over as Finance Director ...

[6] The resolution was not dated, but signed by the 1st and 2nd defendants.

[7] This first Circular Resolution which was sent to the plaintiff is in an enclosure to a letter dated 5 January 2010 which explains the circumstances leading to the passing of the Circular Resolution

by the other two directors and thereafter notified and sent to the plaintiff for his signature, purportedly to obtain a unanimous resolution. I quote some relevant parts of the letter:

> You are well aware that you have not contributed in any way as the Finance Director of the Company and have in fact instituted a suit in High Court against Nizam, the Company and me, which would have had the effect of totally destroying the Company had you succeeded ...
>
> ... in view of the irretrievable breakdown of your relationship with Nizam and myself and the resulting breakdown of the communication, Nizam and myself find it impossible to work with you. The fact is further evidenced by the fact that you have not come to the office since the civil suit ...
>
> In the premises, Nizam and I are of the view that it would be in the best interest of the Company if I was to take over your duties as the Finance Director and towards that end Nizam and I have executed a Directors' Circular Resolution to relieve you of your portfolio ... and to hand over the same to myself.
>
> We now forward the Circular Resolution to you for your execution to enable the said resolution to be unanimously approved instead of the majority which is all that is required under the Articles ...

[8] It was made clear to the plaintiff that he would remain as an ordinary director of the company.

[9] The plaintiff replied by writing a rather long letter of protest, and this in turn resulted in another letter being sent on by the 1st defendant enclosing the second Circular Resolution dated 4 January 2010. The word "resign" was replaced by the word "removal", with the 1st defendant stating that this was a "corrective" resolution allegedly prepared on the same day of the first resolution when he realized there was a "mistake" in the use of the term "resign".

[10] This second resolution was however only appended to the 1st defendant's letter of 25 January 2010.

[11] The second resolution reads:

Circular Resolution Resolve:

That YM Raja Dato Raja Azwane bin Raja Ariff is hereby removed as the Finance Director of the Company and Dato' Haji Man bin Haji Mat is hereby appointed as the new Finance Director of the Company.

Confirmed And Approved By:

(Signed)

... ...

Dato' Haji Man Haji Mat Dato' Raja Azwane Raja Ariff

(Signed)

...
Md Nizam bin Md Sherif @ Shariff
Kuala Lumpur
Dated 4th January 2010

[12] The use of the word "resign" has led to differing interpretations placed on it by the parties, and for which this court had ordered a limited cross-examination to be undertaken for the limited purpose of ascertaining the purpose or state of mind of the parties so as to obtain a more secure factual foundation for this court to come to a decision on the legal effect of the first and second Circular Resolutions. This led to the limited cross examination of the 1st defendant and the plaintiff.

[13] According to the plaintiff, he came to the conclusion that the intention of the 1st and 2nd defendants was to have him "resign" voluntarily, and to achieve a unanimous decision on this, so that he would then have no claims against the company. When he protested, the second resolution was prepared and backdated to 4 January 2010.

[14] The 1st defendant, when cross-examined, provided a different explanation. It was allegedly a "mistake" on the part of "my admin manager", to quote the 1st defendant. After realizing this, he immediately directed the second resolution to be prepared on the same day. Thus, according to the 1st defendant's version of the facts, there was no backdating. However, as already noted, this second resolution was only sent by the letter of 25 January

A 2010. No credible explanation was offered why this was so, and why in the very same letter the plaintiff was expressly informed the removal was to take effect from 1 January 2010. Thus, I find upon an assessment of the evidence, the 1st defendant's version of the facts to be inherently improbable.

B

[15] As a matter of human conduct, and in particular the conduct of commercial men, one would expect directors to be well aware of the difference between "resignation" and "removal". When directors approve and sign a Circular Resolution, one would also C expect them to closely scrutinize its wording and effect. After all, they are fiduciaries who have to act with the general interest of the company in mind, and as such act for proper purposes and within the scope of their duties and functions.

D **[16]** It appears evident to me that the intention of the first resolution was to seek a unanimous decision on the resignation of the plaintiff, which of course the plaintiff refused. The second resolution was then prepared and circulated to him for approval. It was not, and could not, have been a "corrective" resolution E prepared on the same day as the first resolution. In any event, both resolutions have the intended effect of removing the plaintiff as the Finance Director.

[17] Given my findings on the evidence, the issues of law then revolve around the following questions:

F

(1) Are the resolutions the result of a valid exercise of directors' powers under the Articles of Association?

(2) If invalid, can an invalid resolution be validated as a matter of G Internal Company Procedure and Management by having the directors properly passing another resolution in accordance with the articles?

(3) If this can be done, should the court nevertheless exercise its jurisdiction to invalidate the purportedly invalid resolutions, H although they can be corrected by the company?

(4) If the court should interfere, what are the supporting principles and rules?

I

[18] First, it is relevant to state as a general proposition that courts should be slow to interfere with the internal decisions of companies as effected through the Board of Directors or its general meeting. Business decisions are best resolved by businessmen. Thus, where an act of the company, although irregular and not in accordance with its memorandum and articles of association, can be corrected and validated by a subsequent decision of the company, the court should generally defer to the decision of the company.

[19] The cases such as *Browne v. La Trinidad* [1888] 37 Ch. D 1 and *Bentley-Stevens v. Jones & Ors* [1974] 2 All ER 653 fit within this general proposition.

> ... even assuming that the Plaintiff's complaint of irregularities is correct, this is not a case in which an interlocutory injunction ought to be granted. I say that for the reason that the irregularities can all be cured by going through the proper processes and the ultimate result would inevitably be the same. (Bentley-Stevens)

[20] Second, it needs to be also stated as a competing general proposition that the exercise of corporate powers, although technically they might be consistent strictly with the procedure of the company's constitution, can be open to challenge on the basis of equitable principles depending on the precise circumstances of a particular case. One basis for this jurisdiction is the principle that power cannot be used for a collateral or improper purpose. This aspect of the law has been described in some cases as "fraud on a power", although actual fraud is not a necessary ingredient. See *See Teow Chuan & Anor v. YAM Tunku Nadzaruddin ibni Tuanku Jaafar & Ors* [2007] 2 CLJ 82 and *Chan Choon Ming v. Low Poh Choon & 4 Ors* [1995] 1 CLJ 812 and *Khoo Choon Yam v. Gan Miew Chee* [2000] 2 CLJ 788. As these cases suggest, notice requirement, for instance, is paramount. A director affected by a Circular Resolution must be given adequate prior notice. The requirements of Article 90 on the facts of this case are no different. And I must hasten to add, equitable considerations must surely require that the notice must be not only a procedurally proper notice, it must also be *bona fide* and an effective notice. The underlying assumption is to allow the recipient to have knowledge of any proposed action and then present his views. A *fait accompli* document cannot achieve these purposes.

[21] To send a circular for signature as a *fait accompli*, and to attempt to achieve a unanimous decision to have a director "retire" as a Finance Director in that context, cannot in my view be an act that should be allowed to pass as a valid decision. The factual pattern here demonstrates an exercise of corporate power done *mala fide* and for an improper purpose in law. The ultimate reason might at the end of the day be capable of justification, but the manner of arriving at that decision must be regarded as also important.

[22] In such a situation, it is no answer to say the circulars can after all be validated as a matter of internal management and therefore should not be invalidated by this court.

[23] Equitable principles have long been established as an important feature of company law, and they have been applied and reiterated over time in numerous factual situations. One of the latest pronouncements can be found in the decision of the House of Lords in *O'Neill v. Phillips* [1999] 2 BCLC 1:

> ... company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. These principles have, with appropriate modification, been carried over into company law ...
>
> ... there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal rights. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.
>
> The facts of this present case, with respect, fall within the category of "using the rules in a manner which equity would regard as contrary to good faith.

[24] See also the eloquent passage in the recent Court of Appeal decision in *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Cases* [2010] 1 LNS 594; [2010] 6 MLJ 459, at pp. 500 to 501:

> However, the general fiduciary obligation imposed on such beneficiaries sets the boundaries to their freedom within their powers. This general obligation in practice does little more than simply to describe compendiously a series of quite specific duties which prescribe in detail what the fiduciary must or must not do if he is to serve those interests properly. Hopefully, these duties

will ensure that when a decision is made it is in fact made by the fiduciary, and that it is made because he believes it should be made, and that it is made in the interests of his beneficiaries.

Cardozo J in *Morton H Meinhard v. Walter J Salmon et al* 249 NY 458 [1928] at p 464; 164 NE 545 [1928] at p 546 aptly said:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate.

The court has to ensure that a person who has had trust or confidence reposed in him by another, does not abuse that trust or confidence either for his own benefit or to the detriment of that other relying upon him. A classic example would be the trustee or even the agent – they have long felt the force of equity's dictates of 'conscience' upon them.

…

A person is said to be a fiduciary when he has bound himself in some way to protect and/or to advance the interests of another. Thus, when such a position has been assumed by one party to any legal relationship then that party's position is potentially a fiduciary one. In *National Trustees, Executors & Agency Co of Australasia Ltd v. Boyd* [1926] 39 CLR 72 at p 81, it was held that there could be nothing fiduciary in the position of a wife in relation to a special leasing power conferred on her by a deed of family arrangement as this power was hers to be used for her own benefit and was not given so that she might exercise a discretion in the interest of others as well as herself.

Thus, for a position to be fiduciary it must exist for the benefit of another.

…

As a general rule, it is the province of the fiduciary to determine what actions are in the interests of his beneficiaries. The courts are not entrusted with this decision. On the other hand, it is the province of the courts to determine what actions are not in the beneficiaries' interest, and an action will not be in the beneficiaries' interest if it constitutes a breach of any of the specific duties.

[25] Directors of a company are fiduciaries, and as such the exacting standards of the law must apply to them.

[26] In the premises therefore, I find sufficient justification in law to regard the two Circular Resolutions as being tainted with *mala fides* and passed by the majority directors for an improper purpose. I am therefore allowing the plaintiff's application as prayed for in terms of prayers (i), (ii) and (viii) with costs of RM30,000 to be paid forthwith. As for prayer (viii), the amount to be awarded shall be as stated in the submission, being limited to the loss of monthly salaries of RM465,000 for the period January 2010 to March 2011.

[27] It is necessary to add, however, that this court's decision must not be taken as preventing the company, or the board, to come to another decision on the purported removal of the plaintiff as Finance Director. Provided the directors comply *bona fide* with Article 90 in terms of procedure and equitable considerations, an internal decision of the company by its proper organs should be allowed to stand. In this regard, there is much to be commended in the observation of Lee Swee Seng JC in another of the several cases involving the immediate parties here, namely *Dato' Raja Azwane v. Dato' Man bin Mat & Anor* [2010] 1 LNS 1036, who cited Walter Woon on Company Law that "[e]ven if the articles allow a circular resolution to be effective when signed by the majority, notice of the resolution must still be given to all directors. [o]therwise a cabal of controlling directors could do things without the knowledge of the rest of the board, a situation fraught with danger for the company" (at p. 528 of the report). The learned Judicial Commissioner also pithily observed at pp. 525 and 526 of the report:

> It is not uncommon for the majority to flex their muscles and ride roughshod over the rights of the minority or to bulldoze their way through any bargain they hope to strike. The fact that Article 90 merely requires a resolution in writing to be signed by a majority of the directors of the company for it to be valid and effectual does not mean that resolution does not have to be brought to the notice of all directors of the company. It is the consultation with all the directors, the conferring with one another and the consensus that may be arrived at that constitute the collective decision of the board ...

[28] I fully agree with the views expressed by the learned Judicial Commissioner. In a case such as the present therefore, it is best if the notice requirement be satisfied in the normal way by calling for a proper board meeting to pass any necessary resolution. Better commercial judgment might just prevail when there is a face-to-face interaction.